IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 470

RACHEL MAYER, ISAAC H. MAYER AND CARL MEYER, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF LEVY MAYER, DECEASED,

Petitioners,

vs.

MABEL G. REINECKE, AS COLLECTOR OF INTERNAL REVENUE IN AND FOR THE FIRST INTERNAL REVENUE DISTRICT OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ISAAC H. MAYER,
CARL MEYER,
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Attorneys for Petitioners.

Chicago, Illinois, October 19, 1942.

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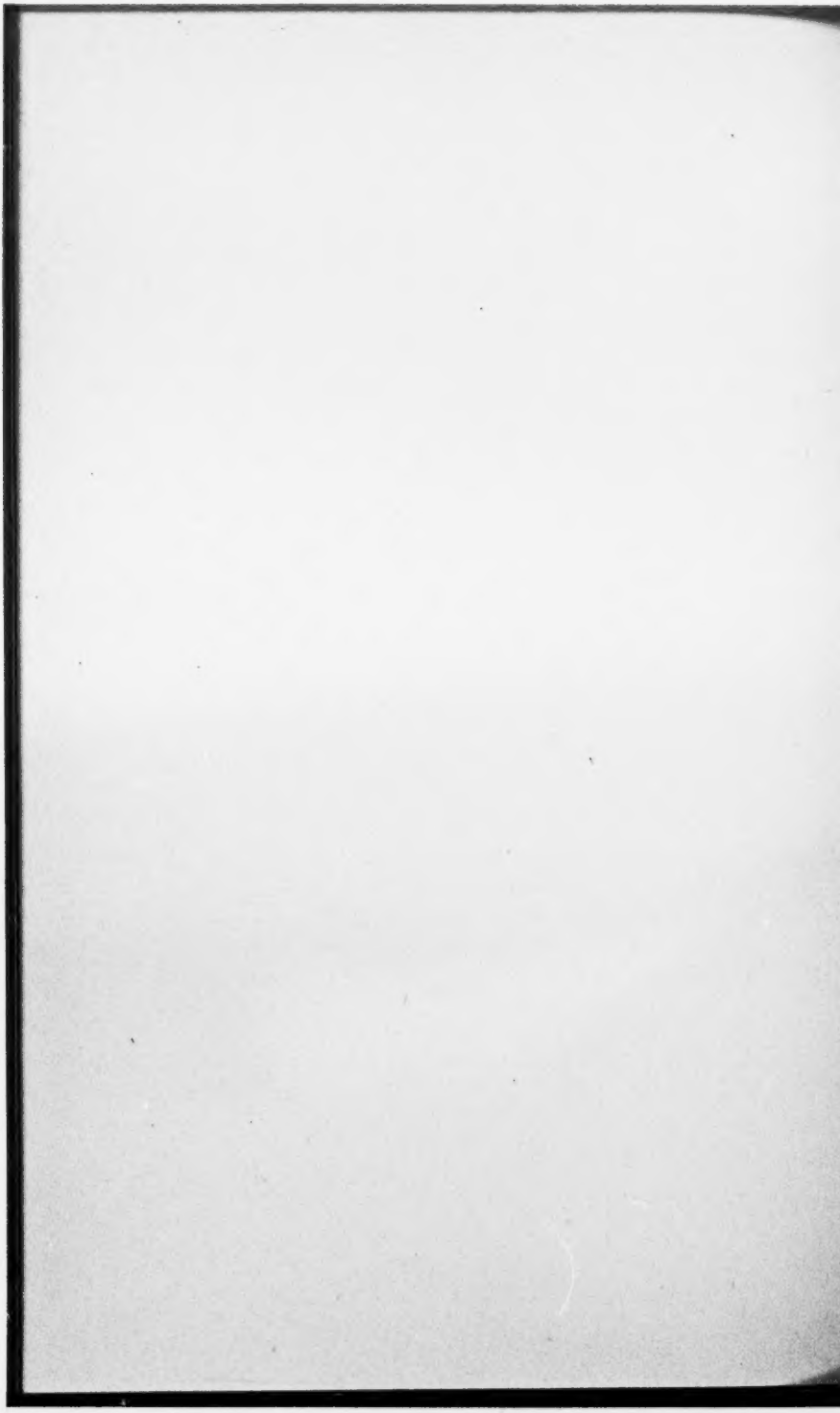

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MABEL G. REINECKE, AS COLLECTOR OF INTERNAL REVENUE IN AND FOR THE FIRST INTERNAL REVENUE DISTRICT OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Rachel Mayer, Isaac H. Mayer and Carl Meyer, as Trustees under the Last Will and Testament of Levy Mayer, Deceased, pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on June 23, 1942, which reversed a judgment of the District Court of the United States for the Northern District of Illinois

in favor of petitioners for the sum of $436,156.04 (with 6% interest from August 13, 1923) for a refund of estate taxes (R. 327) and remanded the case to said District Court with directions to enter judgment in respondent's favor (R. 355).

Summary and Short Statement of the Matter Involved.

The decedent, Levy Mayer, a resident of Chicago, Illinois, died in that city on August 14, 1922, leaving a will containing provisions for his widow, Rachel Mayer, a petitioner, and his two daughters, Mrs. Walter A. Hirsch and Mrs. Clarence H. Low. His estate consisted of a large amount of personal property and real estate located in Illinois (R. 320). The real estate was acquired by decedent after his marriage to petitioner, Rachel Mayer, and prior to 1910, which was more than six years before the first estate tax was passed (R. 86, 322).

Under the statutes of Illinois in force at the time of decedent's death (p. 6, *infra*), his widow had a choice of either accepting the testamentary provisions for her benefit, or taking in lieu thereof "one-third of the personal estate after the payment of all debts", and also her "dower in the lands" of decedent. The widow took under the will (R. 321).

On August 4, 1927 the then Trustees duly filed a claim for refund (R. 322) based upon the contentions (a) that the one-third statutory interest of the widow in the personal property of decedent should not have been included in determining the gross value of decedent's taxable estate, because it was not subject to the payment of the expenses of administration, and, therefore, under the provisions of Section 402(a) of the 1921 Revenue Act, 42 Stat. 278, should not have been included; and that it was neither dower nor an interest existing by virtue of a statute creating an estate in lieu of dower, and therefore, under the provisions of Section 402(b) of said Revenue Act of 1921 should not have been included; and (b) that the widow's statutory life in-

terest in one-third of decedent's lands should not have been included in determining the gross value of decedent's taxable estate, because under the Illinois law a widow's dower interest, whether inchoate or consummate was the widow's separate estate acquired by her upon her marriage, or the subsequent purchase of the lands after her marriage, solely by virtue of statute and not by transfer or succession from her husband; and that Section 402(b) of such Revenue Act of 1921 is unconstitutional if construed to include the widow's dower, because, if so construed, it is retroactive and is also a direct tax.

Said claim for refund was rejected by the Commissioner of Internal Revenue in its entirety (R. 116) and this action was then commenced in the Federal District Court for the Northern District of Illinois (R. 2) to recover the amount for which such claim was filed. The District Court held (*Mayer* v. *Reinecke,* 28 F. Supp. 334), that (1) the taxable status of the decedent's property must be determined as of the date of his death; (2) the widow's one-third statutory interest in the decedent's personal property was not subject to the payment of the expenses of administration and for that reason did not come within Section 402(a) of the 1921 Revenue Act and should have been excluded in determining the taxable value of the decedent's property; (3) that under the decision of this Court in *Crooks* v. *Harrelson,* 282 U. S. 55, (A) such statutory interest of the widow must be subject to the payment both of the debts of the decedent and the expenses of administration, (B) debts of the decedent are a separate and distinct thing from expenses of administration, and (C) the fact that such interest of the widow was subject to the payment of the debts of the decedent did not justify its inclusion in determining the taxable value of the decedent's property since such interest of the widow was not also subject to the payment of expenses of administration; (4) the widow's statutory interest in the lands belonging to the husband was unquestionably the separate,

exclusive property of the widow for many years before decedent's death and was not transmitted to her by the death of the decedent; and to hold that Section 402(b) of the Revenue Act of 1921 required inclusion of the value of such interest of the widow in determining the taxable value of decedent's estate would be equivalent to holding that Congress had provided that property belonging to a stranger should be included in determining such value; that such construction would be destructive of the power of Congress to impose an estate tax, and might be equivalent to the imposition of a direct tax by the Federal Government on the property of such widow and also be retroactive.

The United States Circuit Court of Appeals for the Seventh Circuit reversed the decision of the District Court and held that (a), the word, "debts," "includes the expenses of administration as well as the obligations of the decedent", and that therefor the statutory interest of the widow in the personal property of the decedent should be included in determining the taxable value of decedent's estate (the case of *Crooks* v. *Harrelson*, 282 U. S. 55, decided by this Court was not referred to by the Circuit Court of Appeals); (b), the value of the statutory interest of the widow in the real estate of the decedent should be included in determining the value of the taxable estate of the decedent on the theory that the Estate Tax fixes upon the interest of the decedent which ceased by reason of the death.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in *Mayer* v. *Reinecke*, 7 Cir. 130 F. 2d 350 (Adv. Sh.) and will also be found in the transcript of record at p. 349. The opinion of the District Court on demurrer to the declaration is reported in 28 F. Supp. 334. The opinion was reaffirmed by that court on final hearing (R. 300).

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit was entered June 23, 1942 (R. 355). A petition for rehearing was filed by the petitioners herein on July 7, 1942 (R. 356), which was within the 15 days time prescribed by Rule 22 of the Rules of said Circuit Court of Appeals (11 U. S. Sup. Ct. Rep. Dig. Suppl. No. 3, p. 78) and was denied on July 24, 1942 (R. 356). The jurisdiction of this Court is invoked under Section 240(a), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, 940; 28 U. S. C. A., § 347(a), § 350.

Questions Presented.

1. Should the one-third interest in the personal property of decedent, after the payment of "debts," which the widow had under the statutes of Illinois at the time of decedent's death, have been included in determining the gross value of decedent's taxable estate under the provisions of the federal Revenue Act of 1921?

2. Should the statutory life interest, or dower in the lands of decedent which the widow had under the Illinois statutes at the time of the decedent's death, have been included in determining the gross value of decedent's taxable estate under the provisions of the federal Revenue Act of 1921?

Statutes Involved.

Sections 401 and 402 (a) and (b) of the federal Revenue Act of 1921, effective November 23, 1921, (42 Stat. 227, 277, 278, c. 136) the provisions of which were as follows:

> "SEC. 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403)

is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States: * * *"

"SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

"(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;"

Section 10, Chapter 41, Illinois Revised Statutes, (Cahill 1921), the provisions of which were as follows:

"SEC. 10. Any devise of land, or estate therein, or any other provision made by the will of a deceased husband or wife for a surviving wife or husband, shall, unless otherwise expressed in the will, bar the dower of such survivor in the lands of the deceased, unless such survivor shall elect to and does renounce the benefit of such devise or other provision, in which case he or she shall be entitled to dower in the lands and to one-third of the personal estate after the payment of all debts."

Reasons for Allowance of Writ.

1. The United States Circuit Court of Appeals for the Seventh Circuit has decided a federal question in a way probably in conflict with the applicable decision of this Court. Its decision in this matter, dated June 23, 1942, places a construction on Section 402 of the federal Revenue Act of 1921, (which was in force at the time of decedent's death in 1922) which is actually in direct con-

flict with the construction placed on said section by this Court in the case of *Crooks* v. *Harrelson*, 282 U. S. 55.

The Circuit Court of Appeals for the Seventh Circuit held that the one-third of the personal property after payment of "debts," which the widow was entitled to take under Section 10, Chapter 41, Illinois Revised Statutes (Cahill 1921), should be included in the gross estate of the decedent on the ground that the word "debts" in the Illinois statute "includes expenses of administration as well as the obligations of the decedent."

Said Section 10 provides,

> "She [the widow] shall be entitled * * * to one-third of the personal estate after the payment of all debts."

In construing Section 402 (a) of the federal Revenue Act of 1918 (which was identical with Section 402 (a) here involved) this court, in *Crooks* v. *Harrelson*, 282 U. S. 55, 58, (a case which, although drawn to its attention, the Court of Appeals wholly ignored), held (p. 58):

> "The value of the interest of the decedent is not to be included unless it 'is subject to the payment of the charges against his estate *and* the expenses of its administration'—not one or the other, but both. We find nothing in the context or in other provisions of the statute which warrants the conclusion that the word 'and' was used otherwise than in its ordinary sense; and to construe the clause as though it said, 'to the payment of charges and expenses, *or either of them*,' as petitioner seems to contend, would be to add a material element to the requirement, and thereby to create, not to expound, a provision of law. *Nor will it do to say that the words, 'charges against his estate,' include expenses of administration, for plainly they are different and distinct things, generally so classified in the settlement of estates of decedents,* AND SO REGARDED BY CONGRESS, *as evidenced by the discriminating terms of the statute.*"[1]

[1] (Italics and capitals in last sentence are ours.)

This Court having decided that Congress, in enacting the statute in question, regarded debts and expenses of administration as "plainly * * * different and distinct things" and that debts do not include expenses of administration, and that property subject to the payment of "debts" is not taxable under the taxing Act under consideration,—the decision of the Circuit Court of Appeals that "debts" include "expenses of administration" and that property subject to "debts" is taxable under said Act, is plainly in direct conflict with the decision of this Court.

The Circuit Court of Appeals states in its opinion that its opinion is based on "dicta and tacit holdings" of Illinois courts.

We respectfully submit that the Circuit Court of Appeals misapprehended the decisions which it cites in support of its opinion and ignored other decisions of Illinois courts. The cases cited by the Court are distinguished and additional decisions of the Illinois courts are cited in the brief appended hereto (pp. 16-20).

2. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of local law in a way probably in conflict with applicable local decisions

The construction placed by the Circuit Court of Appeals on Section 10, Chapter 41 of the Illinois Revised Statutes (Cahill 1921), is in conflict with the applicable decisions of the Illinois Supreme Court.

The Supreme Court of Illinois has repeatedly held that expenses of administration are different from and are not included within the term "debts", and that expenses of administration are not debts of the deceased but are obligations created by his representative and are merely claims against the representative personally and not against the estate and cannot be filed as claims against the estate.

Fitzgerald v. *Glancy* (1869), 49 Ill. 465, 468:

> "This is the first case, within our knowledge, where debts have been created by an administrator after the

death of his intestate, and allowed by a court as claims against his estate, and an order granted to sell his lands to pay them. They were not such claims, and cannot, by any legal alchemy, be made such, * * *"

This rule has been consistently followed by the Illinois courts:

Walker v. *Diehl* (1875), 79 Ill. 473;
Berry v. *Berry* (1941), 309 Ill. App. 7;
Edwards v. *Lane* (1928), 331 Ill. 442, 451:

"Before an executor or administrator can be allowed credit for expenses of administration it must appear the expenditures were reasonably necessary for the benefit of the estate. An executor or administrator has no power, as such, to create a debt against the estate."

In *Chicago Title and Trust Co.* v. *Fine Arts Building*, (1919) 288 Ill. 142, 150, the court, while speaking of a liability arising out of the contract of the deceased and a liability arising out of the action of the representative, said:

(150) "The former is a claim against the estate of the deceased, while the latter is a claim against the representative. * * * *Such claims are inconsistent*".

In re Estate of Thurber (1924), 311 Ill. 211, 215:

"* * * debts created after the death of the testator cannot be filed as claims against his estate".

People v. *Danforth* (1938), 293 Ill. App. 280, 284:

"The approved practice is to allow the claim for an attorney's fee in representing an administrator against the administrator, personally, and not against the estate, and the proper procedure is for the administrator to pay the fee and take credit therefor in his final account."

The foregoing, controlling decisions were entirely ignored by the Circuit Court of Appeals although drawn to its attention, and, as stated by the Court itself, its opinion on

this point is based *entirely* on "dicta and tacit holdings" of Illinois courts (130 F. 2d at p. 354).

The cases cited by the Court of Appeals are distinguished and additional decisions of the Illinois courts are cited by us in the supporting brief appended hereto (pp. 16-20, *infra*).

The Court of Appeals has decided another important local question in conflict with Illinois decisions, as shown in paragraph 4, *infra*.

3. The Circuit Court of Appeals for the Seventh Circuit has rendered a decision which is also in conflict with the decision of another Circuit Court of Appeals on the same matter.

The decision of the Circuit Court of Appeals for the Seventh Circuit is also in conflict with the decision of the Sixth Circuit Court of Appeals in the case of *Helburn* v. *Ballard*, 6 Cir., 85 F. 2d 613 (affirming 9 F. Supp. 812), in which said Court of Appeals held that the dower interest of the widow in the lands of the decedent should not be included in determining the gross value of the decedent's taxable estate under the provisions of the federal Revenue Act of 1924, which provisions, as to the matter here under consideration, were the same as those of the federal Revenue Act of 1921.

From an examination of the opinions in *Helburn* v. *Ballard* in both the District Court and the Circuit Court of Appeals, it will be seen that the Sixth Circuit Court of Appeals grounded its decision upon the fact that "the position of devisee and doweress are inconsistent", and that "there was no transfer upon which the tax could be based".

4. The Circuit Court of Appeals for the Seventh Circuit has decided another important question of local law in a way probably in conflict with applicable decisions of the Illinois Supreme Court.

It is well settled by the decisions of the Supreme Court of Illinois that a widow's dower interest, whether inchoate,

or consummate, is her exclusive, separate property, that her husband has no interest in or control over it and that said interest cannot be affected in any way without her consent.

Sutherland v. *Sutherland,* 69 Ill. 481, 486.
Blankenship v. *Hall,* 233 Ill. 116, 129.

It is equally well settled by the decisions of the Supreme Court of Illinois that the widow acquires her interest in her husband's lands in Illinois solely by operation of law through her marriage and not from, or through but independently of her husband, and that this interest is a life estate contingent only upon her surviving her husband, and that his death "casts upon her no new estate or interest."

In *Sisk* v. *Smith,* 6 Ill. 503 (a case ignored by the Court of Appeals although drawn to its attention) the court said:

(506) "But although dower is a title inchoate, and not consummate, until the death of the husband, yet it is an interest, which attaches on the land, as soon as there is the concurrence of marriage and seizin."

With respect to the effect of the husband's death the court added:

(507) *"That event, therefore, casts upon her no new estate or interest, but simply consummates a pre-existing imperfect one.* • • •

(508) "The contract of marriage is as operative to confer upon the wife a separate life estate in the lands of her husband, as would be a contract whereby the husband himself had conveyed to any third person, a life estate, in express terms, in the same lands, and as the tenant for life in such case would hold such estate as an incumbrance upon the fee simple estate of the grantor, beyond his reach or control, so does the wife hold her freehold estate beyond the reach or control of her husband, and discharged from all judgments, leases, mortgages, or other incumbrances, made by her husband after the marriage, because her title being consummated by his death, has relation to the time of

> the marriage, and to the seizin which her husband then had, both of which are prior to said incumbrances." (Italics ours.)

To the same effect are *Emmert* v. *Hill*, 226 Ill. App. 1 and *Schoellkopf* v. *DeVry*, 366 Ill. 39, both of which cases were also ignored by the Court of Appeals although drawn to its attention.

In *Schoellkopf* v. *DeVry*, 366 Ill. 39, 44-5, the court said:

> "The wife's life estate, denominated dower, arose solely by operation of law * * *. The wife's right to dower accrues solely because of the marriage relation and is in addition to the share of her husband's estate to which she is entitled under the Statute of Descent."

The cases cited by the Circuit Court of Appeals to support its opinion that the widow's statutory interest in decedent's lands was properly included in valuing decedent's gross estate, are distinguished, and additional decisions of the Illinois courts are cited by us in the supporting brief appended hereto (pp. 21-28, *infra*).

5. The Circuit Court of Appeals for the Seventh Circuit has so construed Section 402(b) of the federal Revenue Act of 1921 as to render said section unconstitutional.

All of decedent's real estate was acquired by him prior to 1910 and while married to the petitioner, Rachel Mayer (R. 86). His widow therefore acquired her dower right many years before the enactment of the first federal estate tax statute which was in 1916 (R. 291). Dower was first included in the estate Tax Act of 1919. In 1924, which was two years after decedent's death, that provision was made retroactive. We respectfully submit that to so interpret Section 402(b) of the federal Revenue Act of 1921 as to require the inclusion of the value of such dower in the taxable estate of the decedent is to render that section unconstitutional and void as retroactive, a direct tax and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, under the princi-

ples announced by this Court in the cases of *Nichols* v. *Coolidge*, 274 U. S. 531; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Coolidge* v. *Long*, 282 U. S. 582; *White* v. *Poor*, 296 U. S. 98, and *Helvering* v. *Helmholz*, 296 U. S. 93.

Petitioners respectfully submit and pray that because of the foregoing special and important reasons the writ of certiorari should issue.

ISAAC H. MAYER,
CARL MEYER,
M. B. KENNEDY,
Attorneys for Petitioners.

Chicago, Illinois, October 19, 1942.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 130 F. 2d 350 (Adv. Sh.) and at page 349 of the record. The opinion of the District Court on demurrer is reported in 28 F. Supp. 334. It was reaffirmed on final hearing (R. 300).

Jurisdiction.

The basis upon which it is contended this court has jurisdiction to review is stated in the petition (*ante*, p. 5).

Statement.

A statement of everything material to a consideration of the questions presented is in the petition (*ante*, pp. 2-4).

Questions Presented.

The questions presented are stated in the petition (*ante*, p. 5).

Reasons for Allowance of Writ.

The reasons for allowing the writ are stated in the petition (*ante*, pp. 6-13).

Statutes Involved.

Sections 401 and 402 (a) and (b) of the federal Revenue Act of 1921 are referred to and quoted in the petition (*ante*, pp. 5, 6).

Section 10, Chapter 41 of the Illinois Revised Statutes (Cahill, 1921) is referred to and quoted in the petition (*ante*, p. 6).

SUMMARY OF ARGUMENT.

I.

Point I of the Argument distinguishes the cases cited by the Circuit Court of Appeals to sustain its decision that the statutory one-third interest of the widow in the personal property of decedent, should be included in determining the gross value of decedent's taxable estate under the provisions of the federal Revenue Act of 1921, and cites additional cases in support of the Petition.

II.

Point II of the Argument distinguishes the cases cited by the Circuit Court of Appeals to sustain its decision that the statutory life interest of the widow in one-third of decedent's lands in Illinois, should be included in determining the gross value of decedent's taxable estate under the provisions of the federal Revenue Act of 1921, and cites additional cases in support of the Petition.

ARGUMENT.

Petitioners respectfully submit that the cases cited and relied on by the Circuit Court of Appeals for the Seventh Circuit do not sustain its opinion, or decision.

Point I.

The cases cited by the Circuit Court of Appeals do not sustain its decision that the word, "debts", includes "expenses of administration" and that therefore the statutory one-third interest of the widow in decedent's personal property should be included in determining the gross value of decedent's taxable estate under the provisions of the federal Revenue Act of 1921 which expressly require the includable property to be subject to the payment of both debts and administration expenses.

The Circuit Court of Appeals states (130 F. 2d at p. 354, R. 354) that its decision is based solely upon "dicta and tacit holdings" of Illinois courts, and uses as its principal example the case of *Laurence* v. *Balch*, 195 Ill. 626. In that case a surviving husband, claiming under a statute not here involved, filed a petition in the Probate Court of Cook County, Illinois, which was administering his deceased wife's estate, claiming the entire personal estate left by her and contending "and asking that he be permitted to pay all claims *and costs* lawfully chargeable against said estate".

The question involved in the case at bar was not involved, raised, or considered by the court in *Laurence* v. *Balch*. As the Supreme Court said in that case (p. 630):

> "* * * it is conceded by both parties that the only question presented for decision here is whether the appellant is entitled to the whole or only to one-third of his deceased wife's estate remaining after the payment of debts and costs."

Apparently the Court of Appeals, though citing and relying on *Zakroczymski* v. *Zakroczymski,* 303 Ill. 264, 269, overlooked the statement in the dissenting opinion in that case that in the case of *Laurence* v. *Balch* "the only question argued and presented to the court for decision by the briefs of counsel was whether he [the surviving husband] was entitled to one-third of the personal property or to all of it."

In the footnote to its opinion (R. 354) the Circuit Court of Appeals refers to three other cases "For further instances of the use of the word 'debts' so as to include more than the obligations of the decedent". We submit that the Circuit Court of Appeals has also misapprehended and misapplied the decisions in those cases.

In *In re Taylor's Will,* 55 Ill. 252 (the first case cited in said footnote) the Illinois Supreme Court says (p. 260):

> "We therefore hold • • • that under our law it is not in the power of the husband so to dispose of his estate as to deprive his widow of the third of the personal property remaining after the payment of *his* debts, • • •."

That case clearly limits the obligations to which the widow's one-third of the personal property is subject, not only to "debts," but also to "his" debts, that is, to the debts of the decedent, himself. That decision, instead of supporting the opinion of the Court of Appeals, supports petitioners' contention.

Again, in *Cribben* v. *Cribben,* 136 Ill. 609, while speaking of the rights of husband and wife, each of whom is entitled to dower in Illinois, the Court said (p. 613):

> "He could only defeat her will by successfully contesting it, or by renouncing its provisions in his favor, and thereby preserve his right to dower in her real estate, and to one-third of her personal estate after the payment of *her* debts."

In *Zakroczymski* v. *Zakroczymski,* 303 Ill. 264 (1922), *supra* (the second case cited by the Court of Appeals in its footnote), the Court quotes and approves the above rule laid down in *In re Taylor's Will* and again limits the "debts" to those of the decedent, and adds (p. 266):

> "This construction of the statute has been followed by the courts in later decisions and has been universally regarded as the settled law of this State."

The sole question involved in the case of *Saunders* v. *Saunders,* 310 Ill. 371 (the third and last case cited by the Circuit Court of Appeals in its footnote) was whether the widow, for whom no provision had been made in the will, had such an interest as entitled her under the Illinois statute to contest the will. The court held that she had no such interest. That question arose upon demurrer and no question was involved, raised, or discussed as to whether or not the interest of the widow was subject to expenses of administration.

The case of *Waddill* v. *Waddill,* 296 Ill. 204, also relied on by the Circuit Court of Appeals, neither involved nor considered the question now under discussion, but involved solely the question whether, under the form of renunciation there filed by the widow, she was entitled to both dower (which is not subject to debts in Illinois) and also to her share in the personal estate under a section of the Illinois Dower Act which is not involved in the instant case but which applied only to cases where, unlike here, the deceased left no child, or descendant. In using the words "debts and claims against the estate", the court in the *Waddill* case was quoting from Section *12* and not from Section 10 which is the one here involved and which omits the words, "and claims against the estate".

Moreover, the Court of Appeals overlooked the fact that expenses of administration are not claims against an estate. (See cases *ante,* pp. 7-9.)

The "dicta and tacit holdings" on which alone the Court of Appeals grounded its conclusion that the widow's statutory interest in decedent's personalty "is subject to all debts of the estate, those of administration as well as those incurred by the decedent", are mere loose expressions which do not even constitute a "precedent". *The Edward,* 1 Wheat. 261, 276.

In *Webster* v. *Fall,* 266 U. S. 507, the question involved was whether the Secretary of the Interior was a necessary party to a suit instituted by a member of the Osage Tribe of Indians seeking a mandatory injunction commanding the Secretary to make certain payments to plaintiff under an act of Congress. Counsel for plaintiff directed this Court's attention to cases where it had proceeded to determine the merits although the suits were brought against subordinate officials without joining the Secretary. In referring to those cases this court said:

> (511) "We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

The same rule obtains in Illinois:

> "Isolated expressions are not to be employed to expand the opinion into holding more than its plain import, or as deciding questions not essential to a determination of the issues before the court." *People* v. *Kennedy,* 367 Ill. 236, 241.

The Court of Appeals not only misapprehended the decisions on which it based its opinion and gave undue weight to "dicta and tacit holdings", but it also ignored the numerous decisions of the Supreme Court of Illinois (*ante,* pp. 8, 9) uniformly holding that an expense of administration arises wholly out of the action of the representa-

tive of the deceased, is a claim against him personally, and is not a claim against the estate and cannot be treated, or filed as such.

We also call the Court's attention to the fact that in the District Court counsel for the respondent unqualifiedly admitted that debts and expenses of administration are entirely separate items (R. 21, 22):

> "Mr. Mayer: * * * In that case (*Crooks* v. *Harrelson*), the court had to distinguish between debts and expenses of administration. * * *
>
> "Mr. Gibbs: I will admit they are separate. I admit that they are not the same."

Such an unqualified admission should, we submit, have precluded respondent from thereafter repudiating it and complaining because the District Court ruled accordingly.

The Court of Appeals also ignored the decision of this Court in *Crooks* v. *Harrelson*, 282 U. S. 55 (*ante*, p. 7) that claims against the estate and debts, or charges against the estate, "plainly * * * are different and distinct things." We respectfully submit that the construction by this Court of a federal tax statute as to what property such statute includes within its terms as taxable thereunder, is controlling. This Court, having decided what Congress meant in respect of the very statute here under consideration, it will not do to say that debts include expenses of administration. Even were the question open to doubt, which it is not,—this being a taxing act—the doubt would have to be resolved in favor of the taxpayer (*Crooks* v. *Harrelson*, 282 U. S. 55, 61).

It cannot be claimed that the widow's statutory interest in the personalty falls under Section 402(b) of said Revenue Act because dower in Illinois land never included any interest in personal property (*Clark* v. *Hanson*, 320 Ill. 480, 484, 487), and the widow takes personalty in lieu of the testamentary provisions and not "in lieu of dower". (*Canavan* v. *McNulty*, 328 Ill. 388.)

Indeed, during the argument on the demurrer counsel for respondent, themselves, insisted that Section 402(a) alone governs this case with respect to the personalty (R. 19, 23, 24).

Point II.

In including the widow's statutory life interest in one-third of decedent's Illinois lands while determining the gross value of decedent's taxable estate, the Circuit Court of Appeals misapprehended the nature of this interest.

In *Sisk* v. *Smith,* 6 Ill. 503, 506, 508 the Supreme Court of Illinois, after an exhaustive review of the history of dower, held that the husband's death "casts upon her no new estate or interest, but simply consummates a pre-existing imperfect one", which is "contingent upon * * * her husband's death", and that "the contract of marriage is as operative to confer upon the wife a separate life estate in the lands of her husband, as would be a contract whereby the husband himself had conveyed to any third person, a life estate, in express terms in the same lands, and as the tenant for life in such case would hold such estate as an incumbrance upon the fee simple estate of the grantor, beyond his reach or control, so does the wife hold her freehold estate beyond the reach or control of her husband, * * * because her title being consummated by his death, has relation to the time of the marriage, and to the seizin which her husband then had".

To the same effect: *Schoellkopf* v. *DeVry,* 366 Ill. 39, 44-5, 49, where the court said:

> "The wife's life estate, denominated dower, arose solely by operation of law. * * * The wife's right to dower accrues solely because of the marriage relation * * *."

The widow's statutory interest in decedent's land was her separate, independent property wholly free from any control over or interest therein on the part of decedent, and the provisions in his will for her benefit constituted an "offer on his part to purchase her statutory interest in his estate for the benefit of the estate." (*McGee* v. *Vandeventer,* 326 Ill. 425, 432.) Where the widow takes under the will it is a "matter of contract or convention between them," and she takes the property "not as a beneficiary under the will, but as a purchaser." (*Carper* v. *Crowl,* 149 Ill. 465, 479.) Counsel for respondent themselves admitted this to be the law in Illinois (R. 23).

Emmert v. *Hill,* 226 Ill. App. 1 shows that where, as here, the widow takes under the will she takes as a *purchaser,* and that the purchase price is her statutory interest in her husband's estate and that the interest which she relinquishes (which includes her dower) is her own separate property, and that the husband's death does not result in any transfer from decedent of any of his property.

These Illinois cases are controlling and they conclusively and uniformly show that in Illinois the widow's dower, whether inchoate, or consummate, is her independent, exclusive property and is in no manner subject to the husband's disposition, or control, and cannot be affected in any way without her consent.

The Circuit Court of Appeals cites in support of its opinion on this point, *Allen* v. *Henggeler,* 8 Cir. 32 F. 2d 69, a case on which respondent's counsel placed their principal reliance. In that case the dower involved was in Nebraska land and its characteristics were wholly unlike those of Illinois dower. The court there held that dower in land in Nebraska "is subject to the payment of debts of the deceased", and "is for his enjoyment, and not hers", and that the husband "could entirely wipe out the

wife's interest", and that "he has every right of ownership, save that he cannot will it without her consent", and that his rights "are among the most valuable incidents of ownership".

The Circuit Court of Appeals in the case at bar construed the decisions of this Court in *Y. M. C. A.* v. *Davis,* 264 U. S. 47 and *Edwards* v. *Slocum,* 264 U. S. 61, as holding that the federal estate tax is measured by the interest of the decedent which ceased at his death, *even though nothing was transferred from the decedent.* We respectfully submit that said decisions do not so hold, and that if they are in point at all, they hold to the contrary.

The question involved in the case of *Y. M. C. A.* v. *Davis,* 264 U. S. 47, was whether the federal estate tax was deductible from an exempt residuary bequest to charities. The charities contended that inasmuch as, in determining the net estate subject to tax, the amount of the residuary charitable bequest was deducted from the gross estate, it was improper to pay the federal estate tax out of such residuary bequest.

When this court, in overruling that contention, said at p. 50 that "what this law taxes * * * the interest which ceased by reason of the death", it obviously referred to an interest which belonged to the deceased and which was transmitted from him by his death. This clearly appears from what this court said in the same connection, and while defining the estate tax, viz. (p. 50):

> "What was being imposed here was an excise upon the *transfer* of an estate upon the death of the *owner.* It was not a tax upon succession and receipt of benefits under the law or the will." (Italics are ours.)

That decision of this Court decides only that the federal estate tax is an excise tax levied upon the net estate left by the decedent and not upon the amounts received by the legatees or devisees under the will. No such question

as was involved in that case is involved in the case at bar.

If the *Y. M. C. A.* case is in point at all in the case here under consideration, it sustains petitioners' contention, inasmuch as in the instant case *the widow did not receive her dower by succession from or gift by the decedent.*

The construction placed by the Circuit Court of Appeals upon that decision of this Court would mean that if a decedent had a life estate terminating on decedent's death, the value of such life estate would be included as taxable in decedent's estate. We submit that the opinion of this Court should not be so construed.

The case of *Edwards* v. *Slocum,* 264 U. S. 61, relied on by the Court of Appeals, holds only that the Government could not add the amount of the federal estate tax to the taxable estate in determining the net estate on which the federal estate tax is computed. The question in that case was entirely different from the question here under consideration. However, if that decision is in point at all, it is authority for petitioners' contention that there must be a *transfer* from *the decedent* and *not a* mere *ceasing of interest* of a decedent. As this Court there says (p. 62), "this is not a tax upon a residue, it is a *tax upon a transfer of* HIS *net estate by a decedent*".

Section 401 of the Revenue Act of 1921 in unmistakable language imposes the tax, not upon a transfer, alone, but "upon the transfer of the net estate *of* every decedent", *i. e.,* the property to be included in the gross estate must belong to decedent.

Section 402(b) does not enlarge the property described in Section 401 of the Revenue Act. By Section 401 the tax is, in unmistakable language, "imposed upon the transfer of the net estate of every decedent", and upon nothing else.

The wife's statutory dower in Illinois lands is a right to one-third of the real estate (owned by the husband at any

time during the marriage) for that portion of her life beginning with her husband's death and ending with her death. She acquires such right upon her marriage, (or the subsequent purchase of the real estate after her marriage), solely by virtue of the statute and not by transfer from her husband. The death of the husband "casts upon her (the widow) no new estate or interest, but simply consummates a pre-existing imperfect one". (*Sisk* v. *Smith,* 6 Ill. 503, 507.) In Illinois the title of the doweress is precisely the same as though the original owner had executed two deeds, the first one giving the wife a life estate in the land contingent only on her surviving her husband, and the second deed conveying title to the husband subject to the wife's life estate. The death of the husband is merely the happening of the event which fixes the date of the commencement of the widow's life estate. The situation is the same as if the widow's right to her life estate would have come into being upon the death of a third person instead of upon the death of her husband. The death of decedent was not the generating source of the wife's interest. Nothing was transmitted or moved from him upon his death. (*Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 348; *Coolidge* v. *Long,* 282 U. S. 582, 597.)

In *Coolidge* v. *Long,* 282 U. S. 582, a trust was created by Mr. and Mrs. Collidge under which the income was to be paid to the settlors and their survivor for life, and after the death of the survivor to their children. In holding a Massachusetts succession tax statute to be unconstitutional, this court said:

> (597-8) "Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen. *Knowlton* v. *Moore,* 178 U. S. 41, 56. Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termina-

> tion of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors."

To same effect: *Industrial Trust Co.* v. *U. S.*, 296 U. S. 220.

The case at bar must not be confused with cases where the deceased had some interest in, or control over the property held to be includable in his estate, such as those involving a joint tenancy, or a tenancy by the entirety.

We also draw attention to *Randolph* v. *Craig*, 267 Fed. 993, in which the opinion was rendered by Judge Sanford, later a distinguished member of this court. Respondent's counsel, while referring to that case in a brief filed below, correctly said (R. 39) that the court there held:

> "If the widow receives her dower not in succession to her deceased husband or by transfer from him, but takes under statutory provisions whereby it vests in her independently of her husband and adversely to his estate, the property assigned to her as dower has been held to be not a part of the husband's gross estate upon which the tax is imposed by the federal estate tax law."

Inasmuch as petitioner, Rachel Mayer, did not and could not acquire her dower by transfer from the decedent, nor through succession from him, as it was never under his control and was never any part of his property, or "of his estate", the *Edwards* case, if in point at all, is, to repeat, authority for the proposition that the value of the widow's dower here should not be included in determining the value of the net estate passing under the will of decedent.

The Circuit Court of Appeals also relied on *Billings* v. *The People*, 189 Ill. 472. That case involved the construction of an inheritance, or succession tax, and not an excise, or estate tax. But "a tax on the privilege of transmission", which is the federal tax, is entirely different from "a tax on the privilege of succession", which is the

State tax. *Stebbins* v. *Riley,* 268 U. S. 137, 144-5; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 270-1. Besides, as was said in *Allen* v. *Henggeler,* 8 Cir. 32 F. 2d 69, 71, one of the cases relied on by the Circuit Court of Appeals in this case, "Decisions under state laws taxing the right of succession or taxing property which passes by will or inheritance are * * * not in point".

In the *Billings* case the Supreme Court of Illinois held that the State tax was levied upon the widow's right to enter into the enjoyment of her estate of dower, although admitting that *she did not receive her dower right by transfer from her husband upon his death.* The court merely held that the State of Illinois, which gave the right of dower to the widow, had the power to modify it, or take it away entirely before it vested. No such power exists in Congress. The decision, in effect, confirms petitioners' contention that the husband never had any interest in or control over the widow's dower and that she acquired her dower rights as her separate, exclusive property through her marriage and not through, but in spite of her husband.

We submit that the following three Illinois cases relied on by the Circuit Court of Appeals (R. 352) and not cited by either party, are readily distinguishable on their facts from the case under consideration.

There is nothing in any of those cases which in any way questions the rule in Illinois that the widow's dower, whether inchoate or consummate, is her separate, exclusive property and that the husband never has any interest therein.

Virgin v. *Virgin,* 189 Ill. 144, involved a sale of certain parcels of real estate to pay debts of a decedent. Certain mortgages had been placed on the property either before the marriage, or the wife had waived her dower by joining in the mortgage. The court therefore held that the widow was entitled to dower only in any surplus in the proceeds

of the sale of the mortgaged premises after the payment of the mortgage indebtedness and the cost and charges of the sale.

Bigoness v. *Hibbard,* 267 Ill. 301, involved only the question of a widow's right to redeem from a foreclosure suit to which she was not made a party.

Bennett v. *Bennett,* 318 Ill. 193, held that the dower interest of a wife is not a freehold estate and that, therefore, the Supreme Court of Illinois was without jurisdiction of the appeal. But see *Firebaugh* v. *Wittenberg,* 309 Ill. 536, 544, wherein the court held that "whether an inchoate right of dower is in legal contemplation a vested right or estate in lands or not, it has always been recognized as a valuable right * * *."

In *McCord* v. *Massey,* 155 Ill. 123, 125, the court said:

> "A right of dower is an incumbrance, * * * and it is immaterial whether that right of dower is inchoate or consummate." (Citing authorities.)

We believe that we have clearly shown that the Circuit Court of Appeals misapplied and failed to follow the principles of prior decisions of this Court and also of the Supreme Court of Illinois, and likewise has failed to give effect to the intent of Congress.

Petitioners respectfully submit and pray that the writ of certiorari should issue.

ISAAC H. MAYER,
CARL MEYER,
M. B. KENNEDY,
Attorneys for Petitioners.

Chicago, Illinois, October 19, 1942.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 470

RACHEL MAYER, ISAAC H. MAYER, AND CARL MEYER, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF LEVY MAYER, DECEASED, PETITIONERS

v.

MABEL G. REINCKE, AS COLLECTOR OF INTERNAL REVENUE IN AND FOR THE FIRST INTERNAL REVENUE DISTRICT OF ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 349–354) is reported at 130 F. 2d 350. The opinion of the District Court on demurrer (R. 67–80), which was adopted as a part of the court's decision on the merits (R. 325), is reported at 28 F. Supp. 334.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 23, 1942 (R. 355). A petition

for rehearing was denied July 24, 1942 (R. 356). The petition for a writ of certiorari was filed on October 21, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether a widow's statutory share in the personal property of her deceased husband is subject under Illinois law to the expenses of administration of his estate and thereby becomes includible in the decedent's gross estate under Section 402 (a) of the Revenue Act of 1921.

2. Whether a widow's dower interest in real property in Illinois is includible in the decedent's gross estate under Section 402 (b) of the Revenue Act of 1921 and, if interpreted to include the dower interest, whether the statute is constitutional.

STATUTES INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227:

> SEC. 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States: * * *.
>
> * * * * *

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

* * * * *

Illinois Revised Statutes (Cahill, 1921):

Chapter 41—Dower.

* * * * *

PAR. 10. PROVISION IN WILL BARS DOWER—ELECTION—RENUNCIATION. Section 10. Any devise of land, or estate therein, or any other provision made by the will of a deceased husband or wife for a surviving wife or husband, shall, unless otherwise expressed in the will, bar the dower of such survivor in the lands of the deceased, unless such survivor shall elect to and does renounce the benefit of such devise or other provision, in which case he or she shall be entitled to dower in the lands and to one-third of the personal estate after the payment of all debts.

STATEMENT

The decedent, Levy Mayer, died testate on August 14, 1922, a resident of Chicago, Illinois (R. 88–89, 320). At his death he left a considerable estate of personal property and certain Illinois real property acquired by him prior to 1910 and during coverture (R. 94, 322). He was survived by his wife and two daughters (R. 89, 320). In his will he devised and bequeathed the residue of his estate in trust, one-half to his wife for life and the balance to his two daughters (R. 4–10, 89). His will further provided that the trustees in their discretion might use any part of the principal of the wife's share for her needs and requirements should the income prove insufficient (R. 7).

Under existing Illinois law the widow was entitled to renounce the testamentary provisions made for her benefit and to take "dower in the lands" and "one-third of the personal estate after the payment of all debts." Illinois Revised Statutes (Cahill, 1921), c. 41, Par. 10. She failed to renounce under the will, however, and in December of 1925 the executors of the estate, having accounted for all of the property of the estate and distributed a portion in accordance with the will, delivered the balance of the estate on hand to the trustees named in the will (R. 89, 320–321).

An estate tax return for the decedent's estate had previously been filed on August 13, 1923,

and the estate tax as finally determined by the Commissioner of Internal Revenue had been duly paid on August 13, 1923, and December 8, 1924 (R. 90, 321). On August 4, 1927, the trustees filed a claim for refund of estate taxes, which claim forms the basis for the present action (R. 91, 103–109). The claim was rejected by the Commissioner (R. 91, 322) and this action was instituted.

On demurrer to the declaration by the Government, the District Court held (1) that the taxable status of the decedent's property must be determined as of the time of his death, unaffected by any action on the part of the widow in electing to take under the will; (2) that the widow's one-third statutory interest in the decedent's personal property was not subject to the payment of administration expenses and for that reason did not come within Section 402 (a) of the Revenue Act of 1921; and (3) that the widow took her dower interest by operation of law and not by transfer or succession, and that therefore this interest was not includible in the decedent's gross estate under Section 402 (b) of the 1921 Act (R. 67–80). After a trial of the case on the merits the District Court rendered its decision in favor of the petitioners and adopted as a part of its decision its opinion on demurrer (R. 320–325).

The Circuit Court of Appeals reversed the decision of the District Court (R. 355). In so ruling it held that the widow's statutory share in

personalty was subject to the payment of expenses of administration and therefore includible in the decedent's gross estate under Section 402 (a), that the widow's dower interest was includible in the decedent's gross estate under Section 402 (b), and that no constitutional right was thereby invaded (R. 351–354).

ARGUMENT

Section 402 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 227, as interpreted by this Court in *Crooks* v. *Harrelson,* 282 U. S. 55, requires the inclusion in the decedent's gross estate of all property "to the extent of the interest therein of the decedent at the time of his death" which is subject (1) "to the payment of the charges against his estate" and (2) "the expenses of its administration." Under Section 10 of the Illinois Dower Act of 1874 the widow is entitled to renounce under her husband's will and to take her dower in realty and "one-third of the personal estate after the payment of all debts." Illinois Revised Statutes (Cahill, 1921), c. 41, Paragraph 10. The widow here failed to renounce the testamentary provisions made for her benefit and took under the decedent's will. The interest which in fact she received was thus subject to both the charges against the decedent's estate and the expenses of its administration. Accordingly, we contended in the court below that inclusion of the value of the widow's interests in the de-

cedent's gross estate should be determined by what actually transpired, from which it necessarily followed that both the personalty and real estate were taxable.[1] In the alternative, we argued that both interests were taxable because under Illinois law the widow's statutory share in personalty was subject to the payment of administration expenses as well as debts of the decedent, and the widow's dower interest was expressly made includible in the decedent's gross estate under Section 402 (b). Although rejecting the first contention,[2] the Circuit Court of Appeals reversed the decision of the District Court for the reasons advanced in the alternative. The petitioners seek review of this determination, asserting that a conflict of decisions exists and

[1] *Continental Illinois Bank & Trust Co.* v. *United States*, 65 F. 2d 506 (C. C. A. 7th), certiorari denied, 290 U. S. 663; *In re Marble's Estate*, 64 F. 2d 745 (C. C. A. 7th).

[2] One of the reasons assigned by the petitioners for granting the writ (Pet. 10) is the existence of a conflict between the decision below and that in *Helburn* v. *Ballard*, 85 F. 2d 613 (C. C. A. 6th), affirming 9 F. Supp. 812 (W. D. Ky.). The *Ballard* decision, however, rests upon the acceptance of the Government's first contention described above. In determining the content of a decedent's gross estate the court there took into consideration facts occurring after the decedent's death, i. e., the widow's election to take under the will. In this case the court rejected that contention. On this point, we do not seek review, and since the court below adopted the petitioner's argument, they too do not seek review on this point. However, if certiorari should be granted we may wish to contend in the alternative that the result below may be sustained upon this ground.

that the interpretation of Section 402 (b) renders it unconstitutional.

1. The inclusion in the decedent's gross estate of the value of the widow's interest in the decedent's personalty turns upon whether this interest is subject to the payment of expenses of administration under Illinois law. The Illinois Dower Act of 1874 provides that, if the widow so elects, she shall be entitled to "one-third of the personal estate after the payment of all debts".[3] Illinois Revised Statutes (Cahill, 1921), c. 41, Paragraph 10. As the court below stated, the question appears never to have been squarely litigated in Illinois. Without exception, however, in a line of considered dicta and holdings *sub silentio* the Illinois courts have stated and held that the widow's statutory share in personalty is subject to all debts of the estate, including the costs of administration as well as obligations created by the decedent.[4] See *Laurence* v. *Balch,* 195 Ill. 626, 627, 630; *Zakroczymski* v. *Zakroczymski,* 303 Ill. 264, affirming 222 Ill. App. 299, 301; *In re Taylor's Will,* 55 Ill. 252, 259; *Saunders* v. *Saunders,* 310 Ill. 371, 372.

[3] The statutory phrase "all debts" is in itself inclusive of obligations created by the executor, since these as well as obligations created by the decedent are "debts."

[4] In conformity with the opinions of the Illinois courts, it is the uniform administrative practice in the probate court of Cook County to deduct debts and expenses of administration before computing the value of the widow's interest (R. 258–268).

The legislative history of Section 10 of the Illinois Dower Act of 1874 removes any possible doubt as to the correctness of the decision below. The provision for a widow's share in personalty first appeared in express form in Section 40 of the Wills Act of 1829 as one-third of the personal estate "after the payment of all just debts and claims against the estate of such testator." Illinois Revised Laws (1829), pp. 204–205. It thereafter appeared in varying form with the phrases "debts and claims," "debts" or "claims," or without any similar qualifying phrase. Illinois Revised Statutes (1845), c. 34, Section 10; Laws of Illinois (1872), pp. 77, 97, 352, 353; Illinois Revised Statutes (Hurd, 1874), c. 41, Section 10; Illinois Revised Statutes (Cahill, 1927), c. 41, Paragraphs 1, 10, 12; Laws of Illinois (1939), p. 13. There is no ground for believing that in the adoption of the provision in varying form the size of the widow's share was being whimsically fluctuated by the Illinois legislature. On the contrary, it was simply reenacting the substance of the provision as it first appeared in the Wills Act of 1829. The courts of Illinois have repeatedly so held. *McMurphy* v. *Boyles,* 49 Ill. 110; *In re Taylor's Will, supra; Zakroczymski* v. *Zakroczymski, supra; In re Estate of Judd,* 292 Ill. App. 563 (1st Dist.).

None of the Illinois decisions which the petitioners cite as conflicting with the decision below in any manner involved Section 10 of the Illinois

Dower Act of 1874. These cases contain statements that in certain other situations a distinction is to be drawn between debts created by the decedent and obligations created by the executor. The petitioners' entire argument is that from these statements it must necessarily follow that the word "debts" in Section 10 of the Dower Act can refer only to debts created by the decedent and not to administration expenses. The *non sequitur* is apparent even in the absence of any expression by the Illinois courts on the meaning of Section 10 of the Dower Act.[5] And the Illinois cases cited above indicate affirmatively that the widow's statutory share in personalty is subject to the cost of administration as well as the debts of the decedent. The asserted conflict with *Crooks* v. *Harrelson*, 282 U. S. 55, *supra*, rests on the assumption that the court below erred in finding that the widow's statutory interest was thus subject to both the expenses of administration and claims against the estate. Since under the law of Illinois her interest is subject to both, the coordinate requirements of the *Harrelson* case are met. Moreover, that case involved real property in Missouri.

[5] The attempt to remove a transfer from the normal incidence of federal taxation by relying upon distinctions drawn by state law requires at least clear and convincing proof that the local law sustains the distinctions urged. Cf. *Helvering* v. *Leonard*, 310 U. S. 80, 86; *Helvering* v. *Fitch*, 309 U. S. 149, 156.

The questions thus posed are now of limited significance. They cannot arise with respect to the estates of persons dying after 1926, since the requirement that the decedent's interest be subject to charges and administration expenses was removed from the estate tax law in Section 302 (a) of the Revenue Act of 1926, and has not reappeared.

2. Section 402 (b) of the Revenue Act of 1921 expressly requires the inclusion in the decedent's gross estate of all property "to the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, * * * or by virtue of a statute creating an estate in lieu of dower * * *." Petitioners attempt to take the dower interest here involved out of the statute by urging that the characteristics of "dower" in Illinois differ from the characteristics of "dower" in many other states. However, the committee reports relating to the adoption of Section 402 (b) as it first appeared in the Revenue Act of 1938 clearly disclose the purpose of Congress to make it all-inclusive. H. Rep. No. 767, 65th Cong., 2d Sess., p. 21 (1939–1 Cum. Bull. (Part 2) 86, 101). The insubstantial local variations which are urged cannot avert the incidence of federal taxation addressed basically to the interest here involved. Cf. *Morgan* v. *Commissioner,* 309 U. S. 78. Moreover, from the very cases relied upon by petitioners and which they assert conflict with the decision below, it would

seem that common law characteristics of dower prevail in Illinois. See, *e. g., Sisk* v. *Smith,* 6 Ill. 503. If subsection (b) is to be given any scope for operation, clearly it must require the inclusion of the value of the widow's dower interest here. See 1 Paul, *Federal Estate and Gift Taxation* (1942), pp. 228–235. See also, *Billings* v. *People,* 189 Ill. 472, affirmed, 188 U. S. 97.

The petitioners contend that this interpretation as applied to real property acquired by the decedent prior to 1918 renders the statutory provision unconstitutional. Their contention apparently rests on the ground that the wife's interest was acquired on the purchase of the property and that therefore no interest is transferred by the husband's death. In view of the decisions of this Court sustaining the estate tax provisions relating to joint tenancies and tenancies by the entireties, there can be no substantial question at this late date as to the validity of the dower provision. *United States* v. *Jacobs,* 306 U. S. 363; *Helvering* v. *Bowers,* 303 U. S. 618; *Griswold* v. *Helvering,* 290 U. S. 56; *Tylor* v. *United States,* 281 U. S. 497. The case for the inclusion of the value of a dower interest is even stronger, since before his death the husband has both the full fee and sole possessory interest, while his wife has only an inchoate interest. Clearly substantial incidents of ownership pass on his death. The constitutionality of the dower provision has been uniformly up-

held. *Allen* v. *Henggeler,* 32 F. 2d 69 (C. C. A. 8th), certiorari denied, 280 U. S. 594; *United States* v. *Waite,* 33 F. 2d 567 (C. C. A. 8th), certiorari denied, 280 U. S. 608; *Nyberg* v. *United States,* 66 C. Cls. 153, certiorari denied, 278 U. S. 646.

CONCLUSION

The decision below is correct and there is no conflict. The petition should therefore be denied.

Respectfully submitted.

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NOVEMBER 1942

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 470

RACHEL MAYER, ISAAC H. MAYER AND CARL MEYER, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF LEVY MAYER, DECEASED,

Petitioners,

v.

MABEL G. REINECKE, AS COLLECTOR OF INTERNAL REVENUE IN AND FOR THE FIRST INTERNAL REVENUE DISTRICT OF ILLINOIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO RESPONDENT'S BRIEF.

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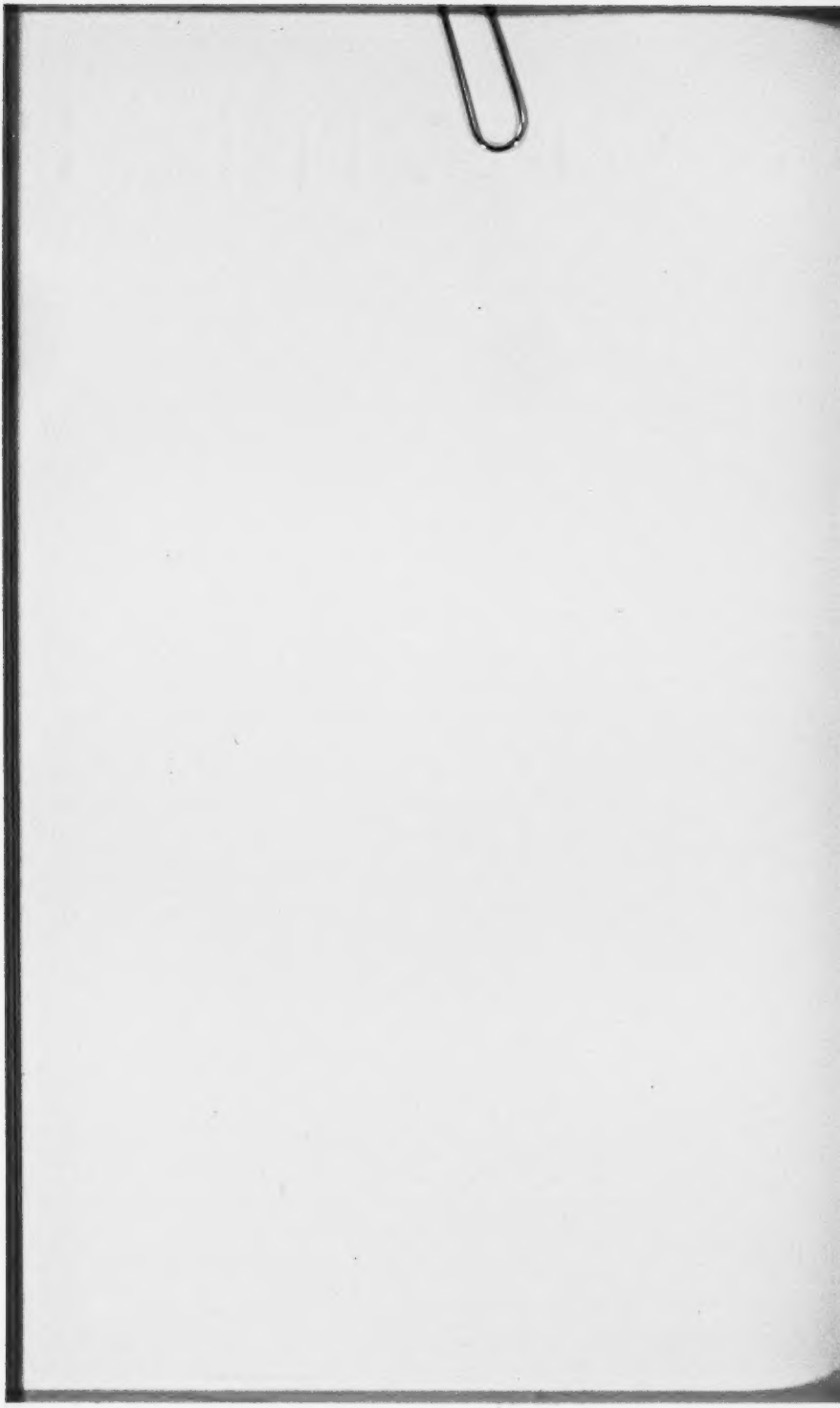

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REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Rachel Mayer, Isaac H. Mayer and Carl Meyer, as Trustees under the Last Will and Testament of Levy Mayer, deceased, for reply to the brief of respondent in opposition to their petition for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, respectfully submit to the Court that:

1. Respondent attempts to circumvent the fact that the Circuit Court of Appeals for the Seventh Circuit placed a construction on section 402(a) of the federal Revenue Act of 1921 directly in conflict with the construction placed on said section by this Court in the case of *Crooks* v. *Harrelson*, 282 U. S. 55, by the statement (respondent's brief, p. 10) that under the law of Illinois the widow's interest in the personal property is "subject to both the expenses of administration and claims against the estate." However, respondent admits in the following words that the Illinois courts have not so decided: "As the court below stated, the question appears never to have been squarely litigated in Illinois." (respondent's brief, p. 8).

The respondent also contends that there is no conflict with *Crooks* v. *Harrelson* because, "that case involved real property in Missouri." We submit that this distinction is without merit as section 402(a) makes no distinction between real and personal property and applies to both wherever situated.

But more important, respondent ignores the fact that this Court decided in that case that Congress, in enacting said statute, regarded debts and expenses of administration as different and distinct things, and held that property cannot be brought within the terms of the statute by saying that debts include expenses of administration.

2. Respondent ignores the fact that the decision of the Circuit Court of Appeals for the Seventh Circuit in this case is in conflict with the decision of the Sixth Circuit Court of Appeals in the case of *Helburn* v. *Ballard*, 85 F. (2d) 613, (affirming 9 F. Supp. 812) except by stating (Note 2, p. 7) that in the latter case the Court "took into consideration the facts occurring after the decedent's death." Respondent entirely ignores the fact that under the law of Illinois the election of the widow to take that which the Will of decedent specified she should receive,

was merely an election to exchange her statutory interest for that which the Will provided for her. As stated by the Supreme Court of Illinois in the case of *Requa* v. *Graham* (1900), 187 Ill. 67, 69-70:

> "And in *Blatchford* v. *Newberry,* 99 Ill. 11, (on p. 62) it is said: 'A provision by will in lieu of dower is, in fact and in legal effect, a mere offer by the testator to purchase out the dower interest for the benefit of his estate.' In *Isenhart* v. *Brown,* 1 Edw. Ch. 413, which is referred to and endorsed by the court in *Carper* v. *Crowl, supra,* the court, in speaking of a devise in lieu of dower, said: 'It is the price put by the testator himself upon the right, and which she is at liberty to accept. Her relinquishment of dower forms a valuable consideration for the testamentary gifts. In this point of view she becomes a purchaser of the property left to her by the will."

3. We respectfully call the following matters to this Court's attention with respect to respondent's argument:

The statement made on page 8 of respondent's brief as to the dicta in Illinois decisions with respect to the liability of the widow's statutory share in the personalty for the payment of costs of administration, is incorrect. Petitioners in their brief (pp. 8-9, 16-18) have not only distinguished these cases but have cited other Illinois cases directly contra.

The statement in footnote 4 on page 8 of respondent's brief with respect to the practice in the probate court of Cook County, Illinois (which is but 1 out of 102 counties in Illinois), is not only inaccurate, but all evidence with respect thereto was stricken from the record. (R. 300.)

The legislative history of the Illinois Dower Act is incorrectly set out on page 9 of respondent's brief, but such history is immaterial, as the Illinois courts have repeatedly held that "expenses of administration" are neither "debts" nor a "claim against the estate". The

law in Illinois is well stated by the Illinois Supreme Court in the case of *Chicago Title and Trust Co.* v. *Fine Arts Building,* (1919) 288 Ill. 142, 150, wherein the court, while speaking of a liability arising out of the contract of the deceased and a liability arising out of the action of the representative of the estate, said:

> "The former is a claim against the estate of the deceased, while the latter is a claim against the representative. * * * *Such claims are inconsistent*". (Italics ours.)

And in the case of *In re Estate of Thurber* (1924), 311 Ill. 211, 215.

> "* * * debts created after the death of the testator cannot be filed as claim against his estate."

4. The respondent contends (br. p. 11) that the petition should be denied because the Revenue Act of 1921 has been amended so that the question as to the propriety of including the widow's statutory interest in the personal property in the taxable estate cannot arise as to persons dying after 1926.

We respectfully submit that this is not a ground for denying the petition. This Court in the case of *Crooks* v. *Harrelson,* 282 U. S. 55, *supra,* over a similar objection made by the taxpayer, granted certiorari on the petition of the Government under circumstances identical with those present here.

We respectfully submit that the petition should be granted.

Isaac H. Mayer,
Carl Meyer,
M. B. Kennedy,
Attorneys for Petitioners.

Chicago, Illinois, November 25, 1942.